



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

December 13, 2010

Mr. Mark Adams  
Assistant General Counsel  
Office of the Governor  
P.O. Box 12428  
Austin, Texas 78711

OR2010-18661

Dear Mr. Adams:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 402752.

The Office of the Governor (the "governor") received a request for all Texas Enterprise Fund ("TEF") applications that have been submitted to the governor. You state the governor has released some of the responsive applications. You claim the applications submitted in Exhibit C are excepted from disclosure under sections 552.104 and 552.131 of the Government Code. Although you take no position on the public availability of the applications submitted in Exhibit B, you state release of the information in Exhibits B and C may implicate the proprietary interests of the third party applicants. Thus, you state the governor notified these third parties of the governor's receipt of the request for information and of the companies' right to submit arguments to this office as to why their information at issue should not be released. *See* Gov't Code § 552.305(d); *see also* Open Records Decision No. 542 (1990) (determining that statutory predecessor to section 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception to disclosure in certain circumstances). We have considered the submitted arguments and reviewed the submitted information.

First, we consider the governor's arguments against disclosure of the TEF applications in Exhibit C. Section 552.104 of the Government Code excepts from disclosure "information that, if released, would give advantage to a competitor or bidder." Gov't Code § 552.104(a). The protections afforded by section 552.104 serve two purposes. One purpose is to protect the interests of a governmental body by preventing one competitor or bidder from gaining

an unfair advantage over others in the context of a pending competitive bidding process. *See* Open Records Decision No. 541 (1990). The other purpose is to protect the legitimate marketplace interests of a governmental body when acting as a competitor in the marketplace. *See* Open Records Decision No. 593 (1991). In both instances, the governmental body must demonstrate actual or potential harm to its interests in a particular competitive situation. *See* Open Records Decision Nos. 593 at 2 (1991), 463 at 1 (1987), 453 at 3 (1986). A general allegation of a remote possibility of harm is not sufficient to invoke section 552.104. *See* ORD 593 at 2. Furthermore, section 552.104 generally is not applicable once a competitive bidding situation has concluded and a contract has been executed. *See* ORD 541.

You explain although the applications in Exhibit C were submitted to the governor by companies seeking TEF grants, none of these applications have been approved or denied; the governor is currently considering these companies' TEF applications. You explain release of this information would give advantage to other entities seeking funding from the TEF by revealing details that would permit applicants to tailor their TEF applications to only slightly exceed the offerings of competing applicants. You also state release of this information would harm the economic interests of the State of Texas by revealing economic incentives Texas offers, its negotiating strategies, and the identities of the companies seeking opportunities in Texas. You explain release of such information would permit other states to offer slightly more favorable incentives to these companies, undermining Texas' ability to compete with other states in attracting these businesses. Based on these representations and our review, we agree release of the applications in Exhibit C at this time would harm the governor's interest in particular competitive situations, both by giving an unfair competitive advantage to the companies competing with these TEF grant applicants, and by interfering with the governor's competitive recruitment of these businesses to Texas. Therefore, the governor may withhold the applications in Exhibit C under section 552.104 of the Government Code.<sup>1</sup>

An interested third party is allowed ten business days after the date of its receipt of the governmental body's notice under section 552.305(d) to submit its reasons, if any, as to why information relating to that party should be withheld from public disclosure. *See* Gov't Code § 552.305(d)(2)(B). The Boeing Company ("Boeing"), DCFS USA LLC ("DCFS"), HelioVolt Corporation ("HelioVolt"), and Health Management Systems, Inc. ("HMS") have all submitted comments objecting to disclosure of their TEF applications in Exhibit B. However, as of the date of this letter we have not received comments from any of the remaining third parties whose TEF applications are in Exhibit B explaining why any portion of those companies' submitted information should not be released. Therefore, we have no basis to conclude these remaining third parties have any protected proprietary interest in their submitted information. *See id.* § 552.110; Open Records Decision Nos. 661 at 5-6 (1999) (to prevent disclosure of commercial or financial information, party must show by specific

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<sup>1</sup>As our ruling is dispositive for this information, we need not address the remaining arguments against its disclosure submitted by the governor or third parties.

factual evidence, not conclusory or generalized allegations, that release of requested information would cause that party substantial competitive harm), 552 at 5 (1990) (party must establish *prima facie* case that information is trade secret), 542 at 3 (1990). Consequently, the governor may not withhold any portion of the information pertaining to the third parties that have not submitted comments to this office on the basis of any proprietary interest those companies may have in their information. We will address the arguments submitted by Boeing, DCFS, HelioVolt, and HMS.

HMS claims portions of its application are excepted under section 552.104 of the Government Code. However, this section only protects the interests of a governmental body. *See* Open Records Decision No. 592 at 8 (1991) (purpose of section 552.104 is to protect governmental body's interest in competitive bidding situation). Because section 552.104 does not protect the interests of third parties, and because the governor does not claim this section applies to the information in Exhibit B, the governor may not withhold any portion of HMS's application under this section.

Boeing claims portions of its application should be withheld pursuant to the section 552(b)(4) exemption of the federal Freedom of Information Act ("FOIA"). However, in Attorney General Opinion MW-95 (1979), this office determined FOIA does not apply to records held by a Texas agency or its political subdivisions. Furthermore, this office has stated in numerous opinions that information in the possession of a governmental body of the State of Texas is not confidential or excepted from disclosure merely because the same information is or would be confidential under one of FOIA's exceptions. *See* Open Records Decision Nos. 496 at 4 (1988), 124 at 1 (1976). The information at issue in this case is held by the governor, a governmental entity of the State of Texas. Accordingly, Boeing's information may not be withheld pursuant to FOIA.

Boeing, HMS, and HelioVolt each assert section 552.110 of the Government Code protects information submitted in the companies' applications. Section 552.110 protects the proprietary interests of private parties by excepting from disclosure two types of information: (1) "[a] trade secret obtained from a person and privileged or confidential by statute or judicial decision," and (2) "commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained." *See* Gov't Code § 552.110(a)-(b).

Section 552.110(a) protects trade secrets obtained from a person and privileged or confidential by statute or judicial decision. *Id.* § 552.110(a). The Texas Supreme Court has adopted the definition of a "trade secret" from section 757 of the Restatement of Torts, which holds a "trade secret" to be

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It

differs from other secret information in a business . . . in that it is not simply information as to a single or ephemeral event in the conduct of the business . . . . A trade secret is a process or device for continuous use in the operation of the business . . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). This office will accept a private person's claim for exception as valid under section 552.110(a) if that person establishes a *prima facie* case for the exception, and no one submits an argument that rebuts the claim as a matter of law. *See* ORD 552 at 5: However, we cannot conclude section 552.110(a) is applicable unless it has been shown the information meets the definition of a trade secret and the necessary factors have been demonstrated to establish a trade secret claim.<sup>2</sup> Open Records Decision No. 402 (1983).

Section 552.110(b) requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would likely result from release of the information at issue. *See* ORD 661 at 5-6 (for information to be withheld under commercial or financial information prong of section 552.110, business must show by specific factual evidence that substantial competitive injury would result from release of particular information at issue).

Boeing claims its application should not be released because information voluntarily provided to a governmental body may be withheld if it is not customarily released to the public. Additionally, HMS contends release of its application would discourage private entities from further dealings with the governor. In advancing these arguments, Boeing and HMS appear to rely, in part, on the test pertaining to the applicability of the section 552(b)(4) exemption in FOIA to third-party information held by a federal agency, as announced in *National Parks & Conservation Association v. Morton*, 498 F.2d 765 (D.C. Cir. 1974). *See*

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<sup>2</sup>The Restatement of Torts lists the following six factors as indicia of whether information constitutes a trade secret:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors;
- (5) the amount of effort or money expended by [the company] in developing the information;
- (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b; *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

also *Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871 (D.C. Cir. 1992) (commercial information exempt from disclosure if it is voluntarily submitted to government and is of a kind that provider would not customarily make available to public). Although this office once applied the *National Parks* test under the statutory predecessor to section 552.110, that standard was overturned by the Third Court of Appeals when it held *National Parks* was not a judicial decision within the meaning of former section 552.110. See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766 (Tex. App.—Austin 1999, pet. denied). Section 552.110(b) now expressly states the standard to be applied and requires a specific factual demonstration that the release of the information in question would cause the business enterprise that submitted the information substantial competitive harm. See ORD 661 at 5-6 (discussing enactment of section 552.110(b) by Seventy-sixth Legislature). The ability of a governmental body to continue to obtain information from private parties is not a relevant consideration under section 552.110(b). *Id.* Therefore, we will consider only the interests of Boeing and HMS in withholding their respective applications.

Both Boeing and HMS claim their applications contain trade secrets that are confidential under section 552.110(a). Although Boeing claims its application reveals its proprietary methods and processes, upon review we find the submitted information does not contain any details that actually explain the company's methodologies that could be protected as trade secrets. The other information Boeing and HMS have marked pertains to the companies' staffing, organization, pricing, experience, and general qualifications. Section 552.110 is generally not applicable to these types of information. See Restatement of Torts § 757 cmt. b.; ORD 319 at 3 (statutory predecessor to section 552.110 generally not applicable to information relating to organization and personnel, market studies, professional references, pricing and qualifications and experience). Thus, we conclude Boeing and HMS have not established any of the information in the companies' applications meets the definition of a trade secret, and the governor may not withhold any part of their applications on that basis.

Boeing, HMS, and HelioVolt each raise section 552.110(b). However, having reviewed these companies' submitted arguments, they have made only conclusory assertions that release of their applications would cause the companies substantial competitive injury, and has provided no specific factual or evidentiary showing to support such assertions. See generally Open Records Decision Nos. 661 (1999), 509 at 5 (1988), 319 at 3 (1982). Therefore, the governor may not withhold any portion of the applications pertaining to Boeing, HMS, or HelioVolt under section 552.110(b) of the Government Code.

Next, DCFS claims its application is excepted from disclosure under section 552.131 of the Government Code. Section 552.131 provides in relevant part:

- (a) Information is excepted from [required public disclosure] if the information relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to:

(2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

(b) Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from [required public disclosure].

Gov't Code § 552.131(a)(2), (b). DCFS raises section 552.131(a)(2) for the portions of its application containing information related to the company's staffing, hiring parameters, salary and benefit levels, possible location changes, and financial data. DCFS generally claims the release of such information would put the company at a competitive disadvantage. However, DCFS has not provided any arguments that are based on specific factual evidence demonstrating how disclosure would cause the company substantial competitive harm. *Id.* Thus, no portion of DCFS's application may be withheld under section 552.131(a)(2).

DCFS also raises section 552.131(b) for portions of its application. However, section 552.131(b) is designed to protect the interests of governmental bodies, not third parties. Because the governor does not assert the information in Exhibit B is excepted under section 552.131(b), this section is inapplicable to the information at issue. Thus, the governor may not withhold any portion of DCFS's application under section 552.131(b) of the Government Code.

Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."<sup>3</sup> *Id.* § 552.101. Section 552.101 encompasses the doctrine of common-law privacy, which protects information if it (1) contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) is not of legitimate concern to the public. *Indus. Found. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976). To demonstrate the applicability of common-law privacy, both prongs of this test must be demonstrated. *Id.* at 681-82. Prior decisions of this office have determined that personal financial information not related to a transaction between an individual and a governmental body generally meets the first prong of the common-law privacy test. *See generally* Open Records Decision No. 600 (1992). However, there is a legitimate public interest in the essential facts about a financial transaction between an individual and a governmental body. *See id.* at 9 (information revealing that employee participates in group

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<sup>3</sup>The Office of the Attorney General will raise mandatory exceptions on behalf of a governmental body, but ordinarily will not raise other exceptions. *See* Open Records Decision Nos. 481 (1987), 480 (1987), 470 (1987).

insurance plan funded partly or wholly by governmental body is not excepted from disclosure); *see also* Open Decision Nos. 545 (1990) (financial information pertaining to receipt of funds from governmental body or debts owed to governmental body not protected by common law privacy), 523 (1989). Whether financial information is subject to a legitimate public interest and therefore not protected by common-law privacy must be determined on a case-by-case basis. *See* Open Records Decision No. 373 (1983). The applications for HelioVolt and Aspen Power, LLC (“Aspen Power”) contain certain named individuals’ percentage of ownership in those companies. We find these percentages consist of personal financial details pertaining to the named individuals, and are not essential facts about the companies’ financial transactions with the governor. We therefore conclude the personal financial information we marked in the applications for HelioVolt and Aspen Power is of no legitimate public concern, and the governor must withhold this information under section 552.101 of the Government Code in conjunction with common-law privacy.

Section 552.136 of the Government Code states that “[n]otwithstanding any other provision of this chapter, a credit card, debit card, charge card, or access device number that is collected, assembled, or maintained by or for a governmental body is confidential.” Gov’t Code § 552.136(b). Section 552.136(a) defines “access device” as “a card, plate, code, account number, personal identification number, electronic serial number, mobile identification number, or other telecommunications service, equipment, or instrument identifier or means of account access that alone or in conjunction with another access device may be used to . . . obtain money, goods, services, or another thing of value [or] initiate a transfer of funds other than a transfer originated solely by paper instrument.” *Id.* § 552.136(a). Upon review, the applications submitted by Boeing, DCFPS, HelioVolt, HMS, Aspen Power, Becton Dickinson and Company, Facebook Inc., Kohl’s Department Stores, Neutex Advanced Energy Group Inc., TapcoEnpro International Inc., Acadia Enterprises, and Amazon.com.kydc LLC contain bank account and routing numbers that are access device numbers for purposes of section 552.136. The governor must withhold these numbers, which we have marked, under section 552.136.<sup>4</sup>

In summary, the governor may withhold Exhibit C under section 552.104 of the Government Code. In Exhibit B, the governor must withhold the personal financial information we marked under section 552.101 of the Government Code in conjunction with common-law privacy as well as the bank account and routing numbers we marked under section 552.136 of the Government Code. The remaining portions of Exhibit B must be released.

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

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<sup>4</sup>We note this office issued Open Records Decision No. 684 (2009), a previous determination to all governmental bodies authorizing them to withhold ten categories of information, including bank account numbers and routing numbers under section 552.136 of the Government Code, without the necessity of requesting an attorney general decision.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at [http://www.oag.state.tx.us/open/index\\_orl.php](http://www.oag.state.tx.us/open/index_orl.php), or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act must be directed to the Cost Rules Administrator of the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,



Bob Davis  
Assistant Attorney General  
Open Records Division

RSD/em

Ref: ID# 402752

Enc. Submitted documents

c: Requestor  
(w/o enclosures)

All Third Parties  
(w/o enclosures)